

U.S. Department of Labor

Labor-Management Services Administration
Washington, D.C. 20216



Reply to the Attention of:

OPINION NO. 82-18A

Sec. 3(2)

MAR 22 1982

Ms. Sheila E. Schlitter
Chapman and Cutler
111 West Monroe Street
Chicago, Illinois 60603

Dear Ms. Schlitter:

This is in reply to your letter of January 22, 1982, requesting an advisory opinion regarding coverage under title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether an individual retirement account (IRA) payroll deduction program would be treated as an employee pension benefit plan under title I of ERISA solely because of a payment by the employer of an administrative fee to be charged by the IRA sponsor to offset the expenses of payroll deduction which are incurred by the IRA sponsor.

You advise that Harris Trust and Savings Bank (the Bank) is permitted under the Internal Revenue Code to act as a trustee for an IRA. Because of the increased number of persons eligible, effective January 1, 1982, to establish IRAs and the expressed desire of many employers to ease the ability of their employees to maintain an IRA by offering payroll deduction programs for employee contributions to their IRAs, the Bank will offer IRAs to be funded by employee contributions transmitted directly to the Bank by an employer pursuant to an IRA payroll deduction program. The Bank wishes to charge an administrative fee to each employer which maintains such a payroll deduction program. This fee will vary according to the cost of processing information submitted by the employer. The Bank proposes to charge the cost of this fee to the employer. Individuals who maintain IRAs with the Bank outside of an IRA payroll deduction program are not charged this administrative fee. The fee charged appears to be solely to offset the expenses of establishing and operating a payroll deduction program.

You note that in Opinion 77-29A (issued March 16, 1977) the Department of Labor (the Department) held that the payment of an "administrative" fee by an employer on behalf of its employees would constitute endorsement of an IRA program. You argue that this administrative fee which will be imposed on the employer rather than the employee does not represent a fee which would otherwise have to be paid by an employee who desires to establish an IRA offered by the Bank outside of a payroll deduction program. It is your position that the administrative fee proposed by the Bank differs from the administrative fee at issue in Opinion 77-29A because the

Bank's administrative fee is charged solely for the purpose of making a payroll deduction program available, the employees do not otherwise benefit from the employer's payment of the fee, and it is probable that participating employees will not even be aware that the administrative fee has been charged by the Bank or paid by the employer.

Section 3(2)(A) of title I of ERISA defines the term "employee pension benefit plan" as:

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

- (i) provides retirement income to employees, or
- (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

In regulation 29 C.F.R. §2510.3-2 the Department described certain programs which would not be considered to constitute "employee pension benefit plans" within the meaning of section 3(2)(A) of ERISA. With regard to IRAs, regulation section 2510.3-2(d) provided:

(d) Individual Retirement Accounts. (1) For purposes of Title I of the Act and this chapter, the terms "employee pension benefit plan" and "pension plan" shall not include an individual retirement account described in section 408(a) of the Code, an individual retirement annuity described in section 408(b) of the Internal Revenue Code of 1954 (hereinafter "the Code") and an individual retirement bond described in section 409 of the Code, provided that --

- (i) no contributions are made by the employer or employee association;
- (ii) participation is completely voluntary for employees or members;
- (iii) the sole involvement of the employer or employee organization is without endorsement to permit the sponsor to publicize the program to employees or members, to collect contributions through payroll deductions or dues checkoffs and to remit them to the sponsor; and
- (iv) the employer or employee organization receives no consideration in the form of cash or otherwise, other than reasonable compensation for services actually rendered in connection with payroll deductions or dues checkoffs.

In Opinion 81-80A, the Department stated that, if certain specified criteria were met, the Department would not consider an employer to have endorsed an IRA program offered through payroll deduction even if such program is limited to one funding medium provided by one IRA sponsor. However, none of the criteria stated in Opinion 81-80A relate to the payment of administrative fees by the employer. In Opinion 77-29A, which did not involve the

establishment of a payroll deduction IRA program, the Department took the position that the employer would violate regulation section 2510.3-2(d) if it paid an administrative fee "on behalf of" its employee.

It is still the position of the Department that the payment by an employer of a fee or charge for an IRA which is ordinarily imposed by the IRA sponsor on an individual purchasing the IRA, such as a custodial or trustee fee, would violate regulation section 2510.3-2(d). However, it is the view of the Department that an employer will not be in violation of regulation section 2510.3-2(d) merely because it pays a fee charged by the IRA sponsor for the expense of and services involved in the establishment and maintenance of a payroll deduction program if such fees or charges are not charges which would be payable by a person who purchases an IRA outside of the payroll deduction program. This is because such a fee or charge would not ordinarily be borne by an individual purchasing the IRA, but are rather charges which relate to the establishment and maintenance of the payroll deduction mechanism.

Accordingly, based on your representations, it would appear that the administrative fee to be charged by Harris Trust and Savings Bank would not contravene regulation section 2510.3-2(d).

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Jeffrey N. Clayton
Administrator
Pension and Welfare Benefit Programs